No. 95-867

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. ROLAND A. LEBLANC,

Petitioner,

vs.

RAYTHEON COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

The question presented is whether the judgment below dismissing this action for lack of subject matter jurisdiction should be affirmed on the ground that, as the district court found and the First Circuit affirmed, the action is based upon allegations or transactions that have been publicly disclosed within the meaning of the public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

LIST OF ALL PARTIES

Petitioner and respondent are identified in the caption. Raytheon Company has no parent company and has the following nonwholly owned subsidiaries:

Constellation Communications, Inc.
GRAU Automation GmbH and Company
Alliance Logistics LTD
Space Imaging, Inc.
Space Imaging, Ltd.
BSG Schalttechnik G.m.b.H. & Co. K.G.
Arbeitsmedizinische Betreuungsgesellschaft Kieler Betriebe mbH
Anschutz Japan Co. Ltd.
Raytheon Saudi Arabia Limited
Badger-SMAS Ltd.
Shanghai Ebasco - ECEPDI Engineering Corporation
Catalytic Servicios, S.A.
Cosa-United, S.A.
Litwin, S.A.
Hawk Holding, S.A.
Agence Centrale de Produits et D'Equipements S.A.
Litwin Romania S.A.
MYA Badger SNC
Polytec, S.A.R.L.
International Refinery Contractors (IRC) B.V.
International Refinery Contractors (IRC) C.V.
Process Industry Engineering (Pty) Ltd.
Raytheon Engineers & Constructors France S.a.r.L.
Raytheon Engineers & Constructors Italy S.R.l.
Badger Africa (Pty) Ltd.
Rezayat Litwin Company Limited
Secore Services Incorporated
Gibsin Engineers, Ltd.

UME/SMAS
Stearns Catalytic Ingenieria y Construccion Chile Limitada
Systems for Defense
Gesellschaft fuer Verteidigungs Systeme mbH
BSG Schalttechnik G.m.b.H. & Co. K.G.
Standard Missile Company, L.L.C.
Switchcraft Far East Company Ltd.
Thoray Electronics

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31 U.S.C. § 3730(e)(4)(A) ..... i, 1, 5, 7

For the reasons set forth below, Raytheon Company ("Raytheon") hereby opposes the Petition ("Petition") of Roland A. LeBlanc ("LeBlanc") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

Contrary to the statement made in the Petition at 1, the district court's opinion is published. It may be found at 874 F. Supp. 35 (D. Mass. 1995). As is stated in the Petition, the opinion of the court of appeals is not published.

STATUTORY PROVISION INVOLVED

The Petition fails to set out verbatim the statutory provision involved, 31 U.S.C. § 3730(e)(4)(A), through the omission of a portion thereof. The provision reads verbatim as follows (the words omitted in the Petition are italicized):

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative *hearing, in a congressional, administrative,* or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

STATEMENT OF THE CASE

Raytheon corrects certain critical inaccuracies and omissions in the Petition as follows:[1]

LeBlanc gives the impression that he spontaneously began an investigation of the Patriot. *See* Petition at 3. In fact, LeBlanc's so-called "investigation" began with publicly disclosed allegations concerning the Patriot's performance in the Gulf War and, as the district court found as a factual matter and the First Circuit affirmed, added nothing to those public disclosures. *See* the decisions of the district court and the First Circuit in Petitioner's Appendix ("Pet. App.") at 1A-14A.

LeBlanc neglects to mention in the Petition that this action was not sparked by "inside" or nonpublic information of any sort, but rather by public allegations in the media and elsewhere concerning the performance of the Patriot in Desert Storm, public disclosures which LeBlanc has admitted were his "points of departure." Pet. App. at 11A. Thus, the public genesis of this lawsuit was conceded by LeBlanc before the district court. *Id.* Yet, conspicuously absent from LeBlanc's rendition of the case in the Petition is the fact — again conceded by him before the district court — that, prior to amending his complaint to include the allegations concerning the Patriot and Raytheon upon which he now relies, he had read and was familiar with public disclosures of precisely those allegations. In fact, the April 7, 1992 Congressional Hearing on the Patriot's performance in the Persian Gulf addressed each and every one of the allegations of failures or inadequacies in the Patriot's performance that are restated by

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1. Raytheon does not attempt to correct all of the errors in LeBlanc's rendition of the facts, nor does it cure all of LeBlanc's omissions. What are discussed are only those points that Raytheon believes have a bearing on the issue of whether the Petition should be granted.

LeBlanc as the basis for this action.[2] As the district court found:

> Raytheon has lined up LeBlanc's allegations of Patriot defects against public statements criticizing the Patriot, the government and Raytheon. These statements were either made in a congressional hearing on the performance of the Patriot, in published articles or in a report of the General Accounting Office. The lineup shows that *every* defect and failure of the Patriot alleged by LeBlanc in the amended complaint had been disclosed publicly before the present action was filed.

Pet. App. at 8A. (Emphasis in the original.) The district court noted further:

> At the hearing on the suggestion of lack of jurisdiction and motion to dismiss, LeBlanc's counsel conceded that all of the defects of the Patriot alleged in the amended complaint had been previously disclosed publicly. He conceded as well that, before this case commenced, there had been allegations that Raytheon had exaggerated the Patriot's success. In each instance the concession was ineluctable.

Pet. App. at 8A-9A.

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2. By its discussion of LeBlanc's allegations against it, Raytheon does not intend to, nor does it concede that those allegations have any validity whatsoever. To the contrary, Raytheon disputes LeBlanc's allegations in their entirety as untrue in every respect.

As to the latter concession by LeBlanc's counsel noted by the district court, that there had been public disclosures of allegations that Raytheon had exaggerated the success of the Patriot, the district court specifically highlighted the fact that LeBlanc actually included in his amended complaint quotations from published articles by then Representative John Conyers and MIT Professor Theodore Postol, thereby admitting that his allegations in this connection were based on public disclosures. Pet. App. at 8A. As the district court also observed, the article by Representative Conyers' from which LeBlanc quoted featured an inset which highlighted alleged misstatements about the Patriot by Raytheon and the Government under the caption "False Claims. " *Id.* at 8A, n. 4.

Nor, finally, does LeBlanc even allude in the Petition to the fact, again as noted by the district court, that he has never seen the classified design specifications for the Patriot. Pet. App. at 11A. Accordingly, LeBlanc does not know, and indeed has never known, whether any of the alleged failures in the Patriot's performance upon which he relies, even if true, would constitute a "defect," since he does not know the Patriot's design requirements. LeBlanc' s claim in the Petition that he has determined that Raytheon did not comply with specifications, *see, e.g.*, Petition at 5, is false, because he admittedly does not have any knowledge of what the Patriot's specifications were.

What LeBlanc has attempted is transparent. First, he has ignored countervailing public opinion and accepted as "true" only the publicly disclosed allegations of Patriot failures and/or performance inadequacies. Second, he has assumed *a priori* that those alleged failures and/or inadequacies in performance are "defects," *i.e.*, that they constitute failures by Raytheon to manufacture the Patriot in compliance with its specifications (which LeBlanc has never seen).

Finally, he has speculated that Raytheon lied about the purported "defects" to the Government. This entire chain of faulty assumptions, however, is grounded entirely in the allegations of Patriot failures and inadequacies that LeBlanc adopted from public debate.

LeBlanc argued before the district court, as he does in the Petition, that he relied on the public disclosures "merely" as "points of departure" for an "investigation" that he conducted. Pet. App. at llA. But, as the district court rightly concluded, his "investigation" added nothing to those public disclosures:

> [LeBlanc's] investigation, it appears, consisted largely of speaking to Professor [Theodore] Postol and assembling documents from Professor Postol's files and from other experts on the Patriot.

Id. The district court noted that "LeBlanc does not contend that he received any 'inside' information from Raytheon." It concluded, as a factual matter, that "LeBlanc has not come forward with previously undisclosed substantive information about Raytheon's alleged duplicity concerning the Patriot." *Id.* at 10A.

REASONS FOR DENYING THE WRIT

LeBlanc asserts that there are two reasons why a writ of certiorari should be granted in this case. First, he argues that the First Circuit's affirmance of the district court's dismissal of his case was in direct conflict with the holdings of "five other circuits" on the applicable rule of law. Petition at 7. Specifically, he attacks the decisions below with regard to the courts' interpretation of the "public disclosure" and "based upon" requirements of the statute. *Id.* at 7- 17. *See* 31 U.S.C. § 3730(e)(4)(A), cited in the Petition at 2.

Second, he claims that the First Circuit's decision "effectively closes the door to all *qui tam* plaintiffs except those who qualify as an 'original source'," thus, according to LeBlanc, permitting the "exception to swallow the rule" and frustrating Congress' "efforts to broaden *qui tam* jurisdiction." Petition at 7; 17-20.

Neither of LeBlanc's arguments for granting the writ has merit. To begin with, LeBlanc's assertion that the decisions by the district court and the First Circuit in this case conflict with other circuits on the applicable rule of law is simply wrong. With respect to the public disclosure requirement of the jurisdictional bar, the courts below applied the very rule of law urged by LeBlanc, namely, that a *qui tam* action is barred if and only if it is based upon prior public disclosures of "either the allegation of fraud or the critical elements of the fraudulent transaction." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994). LeBlanc lost below because the district court found *as fact*, and the court of appeals affirmed, that "the allegations of the making of false claims by Raytheon had been publicly disclosed as of the time of the filing of the amended complaint." Pet. App. at 10A.

LeBlanc says that the courts below did not apply the interpretation of "based upon" put forward by the Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir. 1994), Petition at 16, referencing in a footnote the supposedly conflicting interpretation of "based upon" applied by other Circuits. *Id.* at n. 17. But differences among the circuits as to the definition of "based upon" are immaterial to the decision of this action. The district court properly held, and the First Circuit properly affirmed, that LeBlanc's action was "based upon" prior public disclosures under *any* extant definition of the phrase. Pet. App. at 11A-14A. In this connection, the district court stated that it

was inclined to agree with the Fourth Circuit's interpretation now relied upon by LeBlanc, and held that, as *a factual* matter, under the Fourth Circuit's definition "the public disclosure bar would apply to this action." *Id.* at 13A.

Finally, LeBlanc's hyperbolic assertion that the lower courts' dismissal of his action will "effectively preclud[e] all *qui tam* suits seeking to prosecute fraud on the part of any manufacturer whose products have been called defective," Petition at 20, makes no sense. LeBlanc's problem is that, as the district court properly found as a matter of fact and the First Circuit properly affirmed, his action is based entirely on *the public disclosure of allegations concerning the Patriot and Raytheon.* For that reason his suit is barred under the "public disclosure bar" of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). The dismissal of this action under that provision self-evidently places no limitation upon *qui tam* suits that are not based upon the public disclosure of allegations or transactions.

In sum, the First Circuit did not enunciate a new rule of law or choose among inconsistent versions of any rule of law; it applied established legal principles to the facts of this case. Thus, the Petition presents no issue of law, let alone one that merits review by this Court. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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